

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

W.A. DREW EDMONDSON, in his capacity
as ATTORNEY GENERAL OF THE STATE
OF OKLAHOMA and OKLAHOMA
SECRETARY OF THE ENVIRONMENT, C.
MILES TOLBERT in his capacity as the
TRUSTEE FOR NATURAL RESOURCES
FOR THE STATE OF OKLAHOMA,

Plaintiffs,

vs.

Tyson Foods, Inc., et al.,

Defendants.

Case No. 4:05-cv-00329-GKF-PJC

**THE CARGILL DEFENDANTS'
RESPONSE TO PLAINTIFFS' MOTION
FOR SANCTIONS (DKT. 2459)**

SUMMARY

Counsel for the Cargill Defendants retained Dr. Tom Ginn to serve as a consultant in September 2005. The Cargill Defendants' counsel decided at the outset of this case that they could not effectively represent their clients without an understanding of what Plaintiffs might allege against the Cargill Defendants over the course of litigation. Counsel interviewed the Cargill Defendants' contract growers to learn about them and how they grow poultry. Counsel and consultants retained by counsel analyzed the information they gathered from independent sources, including information learned from growers and from records of the State of Oklahoma. One of the Cargill Defendants' attorneys selected and compiled a portion of this collected information in the two tables that are the basis for Plaintiffs' Motion, the Cargill "work product documents."

On January 30, 2009, counsel for the Cargill Defendants converted Dr. Ginn from a confidential consulting expert witness into a disclosed testifying expert witness. Plaintiffs took

issue with the Cargill Defendants' assertion of attorney work product protection for documents that had been transmitted to Dr. Ginn when he was a consultant but were unrelated to his work as a testifying expert. The Court, sustaining a ruling of the Magistrate Judge, found that an "ambiguity" existed as to Dr. Ginn's roles as consultant and testifying expert, and resolved this ambiguity in Plaintiffs' favor by requiring production of certain documents. Order of July 20, 2009 at 6 (Dkt. 2356). Plaintiffs now characterize this ambiguity as sanctionable conduct of counsel.

Plaintiffs based their motion for sanctions entirely on the two work product charts—out of the 5,477-page production—and characterize them as unprivileged and deliberately withheld from Plaintiffs, and claim that as a result the charts were unavailable to Plaintiffs for use in two depositions and in connection with two dispositive motions. The facts are different. The two documents were prepared by and at the request of counsel, were withheld from Plaintiffs on the basis of attorney work product privilege, were provided to Plaintiffs promptly when the Court ordered their disclosure, and are part of the Court's record with respect to dispositive motions that were briefed, argued, and denied.

Plaintiffs see this Motion as an opportunity to plug some of the holes in their case by gaining through sanction that which they could not gain on the merits. The law and facts do not support the Motion. Sanctions are not warranted and should not issue.

DISCUSSION

A. The Work Product Documents Are Exempt from Production in Discovery.

Starting with the same grower information the Cargill Defendants delivered to Plaintiffs in the form of Initial Disclosures, the Cargill Defendants' counsel decided to interview growers, consult non-testifying experts, and prepare the charts at issue, all as part of their strategy to

defend this lawsuit. Counsel later delivered this work product to retained consultants, one of whom, Dr. Tom Ginn, later became a testifying expert. (See generally Ehrich Aff.: Dkt. 2461-2.)

By design, the documents are not a complete record of grower information; they are instead a unique subset of information that counsel chose to collect from third party interviews, organized in charts created by counsel. In other words, they are pure attorney work product under the law of this Court. E.g., Lamar v. Williams Comms., LLC, Case No. 04-CV-847 (TCK/PJC), 2007 U.S. Dist. LEXIS 8585 (Feb. 6, 2007).

B. Cargill Properly Asserted Its Attorney Work Product Protection.

Cargill's counsel relied on sound legal authority in contending that attorney work product held by an expert—but that the expert did not consider in performing his work as an expert—remained protected work product under Rule 26(b)(4)(B). (See Resp. to Mot. Compel: Dkt. 2019.) See, e.g., In re PolyMedica Corp. Securities Lit., 235 F.R.D. 28, 33 (D. Mass. 2006) (holding that facts known by non-testifying consultant were protected by work product doctrine, noting “fairness requires that each side fully prepare its own case and not try to benefit through discovery from the other side's better preparation”); see also Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984); All W. Pet Supply Co. v. Hill's Pet Prods. Div., Colgate-Palmolive Co., 152 F.R.D. 634, 638 (D. Kan. 1993) (“plaintiff did not waive the protection afforded by Rule 26(b)(3) for attorney work product by sharing the documents in question with its expert witness”).

Plaintiffs were aware that Cargill Turkey Production, LLC (“CTP”) relied on the work product protection of Rule 26(b)(4) as its basis for not disclosing materials of consulting experts. (See Ex. B to Pls.’ Mot. at Gen. Objs.; Ex. C to Pls.’ Mot. at Gen. Objs.; Ex. D to Pls.’ Mot. at Gen. Objs.: Dkts. 2452-3 to 2452-5.) The plain purpose of Rule 26(b)(4), and thus of CTP’s

objection, was to shield from disclosure privileged communications and attorney work product. See United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995) (“The purpose of the doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation.”).

CTP also directly and openly objected to producing any information that it did not maintain in the ordinary course of business. (See Ex. B to Pls.’ Mot. at Resp. to Interrog. 6 & Gen. Objs.; Ex. C to Pls.’ Mot. at Supp. Resp. to Interrog. 6 & Gen. Objs.; Ex. D to Pls.’ Mot. at Resp. to Interrog. 1 (referencing prior responses) & Gen. Objs.: Dkts. 2452-3 to 2452-5.) CTP advised Plaintiffs that it did not generally maintain information about independent contract growers’ litter use. CTP did provide Plaintiffs with the names, addresses, and GPS coordinates for those growers, and advised Plaintiffs that they needed to gather whatever additional information they wanted regarding litter use themselves. (See Ex. B to Pls.’ Mot. at Resp. to Interrog. 6; Ex. C to Pls.’ Mot. at Supp. Resp. to Interrog. 6: Dkts. 2452-3 to 2452-4.)

Finally, CTP expressly objected to disclosure of documents protected as attorney work product in responding to Plaintiffs’ March 17, 2009 discovery requests. (See Ex. D to Pls.’ Mot. at Gen. Objs.: Dkt. 2452-5); see also N.D. Okla. LCvR26.4 (privilege logs need not list “work product material created after commencement of the action”). Indeed, the exhibits to Plaintiffs’ related motion to supplement the summary judgment record themselves illustrate that Cargill’s counsel and consultants understood that the information was being compiled for purposes of litigation, and that it was confidential attorney work product at the time it was created and distributed among counsel and the consultants. (See, e.g., Pls.’ Mot. Supplement Record at Exs. F & K: Dkts. 2452-7 & 2452-12.)

Indeed, the Cargill Defendants and Plaintiffs have acted consistently and have taken the

same view of the attorney work product protection in handling information provided to or generated by their own consulting and testifying experts. Plaintiffs' discovery responses did not disclose facts or documents developed by their attorneys or their experts; instead, like the Cargill Defendants, Plaintiffs *withheld* their attorney work product and the information gathered by their consulting experts unless and until that information formed the basis for a testifying expert's opinion.

For example, CTP's Amended Request for Production No. 26 sought all documents "relating to any... sampling or analysis of any of the public waters supplies located within the IRW." (Ex A: Pls.' Oct. 31, 2006 Resp. to CTP's Amended First Set of Interrog. and Req. for Prod. at 21.) In response, Plaintiffs:

- objected to the production of "documents which have been prepared in anticipation of litigation or trial by the State's counsel, expert consultants, or agents, which have not yet been identified as experts in this matter" (*id.* at 21: Pls.' Oct. 31, 2006 Resp. to CTP's Amended First Set of Req. for Prod. No. 26),
- objected to "the production of documents or information in the possession of or obtained from non-testifying consultants or experts who have been specifically retained to assist counsel for the State with the prosecution of this litigation" (*id.* at 1),
- objected "to the extent that [the requests] seek the discovery of information that is already in the procession of defendant" (*id.* at 2), and
- asserted that "Cargill Turkey has had ample opportunity by discovery in this action to obtain the information sought" (*id.* at 2).¹

¹ Plaintiffs also repeatedly objected to producing any "information known or opinions held by

(continued on next page)

Plaintiffs' response then directed CTP to publicly available data on the ODEQ website. Plaintiffs' October 31, 2006 response did not, however, produce the document containing phosphorus testing data that their attorney Rick Garren had collected on August 1, 2005 from the Tahlequah Public Works Authority and then transmitted by counsel to Bert Fisher, at the time a consulting expert for the State. (Ex. B: FisherCORR0005206.0001-2.) Despite its transmittal to Dr. Fisher, Plaintiffs regarded the document as attorney work product and declined to produce it.²

Indeed, Plaintiffs' attorneys consistently sent their consulting experts factual information that Plaintiffs did not disclose in response to Defendants' discovery requests. (See, e.g., Ex. C: FisherCORR0004899.0001-2 (Apr. 18, 2005 e-mail from attorney D. Page to consultant B. Fisher summarizing land application data gathered by State's investigators); Ex. D: FisherCORR0004901.0001-2 (Apr. 18, 2005 e-mail from D. Page to consultants R. Olsen & B. Fisher containing a link to research on phosphorus loading); Ex. E: FisherCORR0004865.0001-2 (Apr. 19, 2005 e-mail from D. Page to B. Fisher & R. Olsen forwarding arsenic research); Ex. F: FisherCORR0005067.0001-2 (Apr. 12, 2005 e-mail from D. Page to B. Fisher & R. Olsen attaching report of P reduction in Beaty Creek with handwritten notes); Ex. G: FisherCORR0005134.0001 (e-mail from D. Page to L. Hight, an associate of B. Fisher, containing stream photographs).) Each of these documents contains factual information

(continued from previous page)

expert consultants retained or employed in anticipation of litigation.” (E.g., Ex. H: Pls.' Resp. to Cargill, Inc. Supp. Interrog. No. 2, served June 1, 2007 at 2; see also Ex. I: Pls.' Resp. to Simmons Interrog. No. 1.)

² This sampling document would also have been responsive to CTP's Amended First Set of Requests for Production No. 14 (“all documents relating to any communication between You and any... municipality... or any governmental entity... regarding... the IRW”) and No. 27 (“all documents relating to any... sampling or analysis of any byproduct of water treatment plant

(continued on next page)

gathered, summarized, or analyzed by Plaintiffs' attorneys that was responsive to Cargill discovery requests. But in each instance, Plaintiffs did not produce the document until they produced their testifying experts' supporting materials.

The Cargill Defendants do not fault Plaintiffs for not producing these documents earlier; like the documents the Cargill Defendants gave Dr. Ginn, what Plaintiffs withheld was clearly attorney work product in the hands of a consulting expert, and thus protected from discovery under Rule 26(a)(4). In sum, the legitimate protection of attorney work product in the hands of experts is not sanctionable conduct. On the contrary, as the conduct of both the Cargill Defendants and the Plaintiffs in this action demonstrate, it is a responsible measure to protect confidential litigation strategy.

C. Plaintiffs Suffered No Prejudice from the Documents.

Plaintiffs' motion hints at theoretical prejudice to the State from the Cargill Defendants' conduct, but never actually asserts any specific claim of prejudice. In fact, no prejudice exists.

1. Documents were promptly produced to Plaintiffs.

By Order of July 20, 2009, the Court ordered the Cargill Defendants to produce documents held by Dr. Ginn in his consultant role. The next week, the Cargill Defendants produced 5,547 pages to Plaintiffs. The Cargill Defendants produced an additional 42 pages four weeks later. Plaintiffs make no complaint about the promptness or thoroughness of the Cargill Defendants' compliance with the Court's Order. No prejudice lies here.

2. Dr. Ginn was deposed again by Plaintiffs.

The day after the Court entered its Order, the Cargill Defendants offered Dr. Ginn for a

(continued from previous page)

processes (including but not limited to trihalomethanes), and cancer.”).

second deposition. (July 21, 2009 Ltr.: Dkt. 2461-3.) Plaintiffs accepted the offer and again deposed Dr. Ginn on August 7, 2009. This cannot be the source of prejudice to Plaintiffs.

3. Plaintiffs had access to the information in the Cargill work product from their own business records and from Cargill's discovery responses.

Plaintiffs cannot dispute that they have had a vast body of litter application information since before they began this litigation or that they have gained substantial additional information from the Cargill Defendants. First, Plaintiffs possess all litter application information for all poultry growers in the Oklahoma portion of the IRW. Poultry growers and certified litter applicators in Oklahoma must register with ODAFF, which maintains files for each registered operation and applicator. These files contain specific information relating to each grower's operation including the contracting integrator; the number of houses; capacity of houses, number of flocks per year; soil test phosphorus levels on growers' fields; records of growers' litter application; and whether the grower stored, sold, or gave his litter away—the same types of information contained in the Cargill work product documents at issue here. Plaintiffs collected and produced these documents with their Initial Disclosures in June 2006,³ and these State documents form a primary source of the information shown in the work product documents.

In addition, the Cargill Defendants produced in discovery all of their contract grower files from throughout the IRW – files that include all the information about contract growers that Cargill and CTP kept in the ordinary course of business (as opposed to select items gathered by their counsel in the course of and for purposes of this litigation). These files include inspection

³ The State's initial disclosure production of ODAFF documents is found at OKDA0000001 - 21846. The files specific to Cargill-related growers are: Robert Schwabe OKDA0016237 – 359; Ernest Doyle OKDA0002994 – 3107; Gary Fisher OKDA00003942 – 4047; Greg Hurt OKDA00006302 – 6391; and Clyde Masters OKDA0010055 – 155.

checklists, waste application annual reports, and any Nutrient / Animal Waste Management Plans on file. (See, e.g., Dkt. 2461-4: chart detailing Cargill Defendants’ productions of grower-specific information to Plaintiffs; Dkt. 2461-5: Cargill breeder farm NMPs, filed under seal.) The Cargill Defendants also produced contract grower information charts created specifically for Plaintiffs. (Dkt. 2461-6: CARTP137602-604, CAR000001-02, CAR000003-04.) Finally, the Cargill Defendants provided Plaintiffs with current contact information for each current grower and driving directions to each contract grower location. (Dkt. 2461-7: CARTP088178 – 219; Dkt. 2461-8: CTP Rule 26(a)(1) disclosures.)

These ODAFF files and Cargill productions demonstrate that much of the information in the Cargill attorney work product charts was not “new” information to Plaintiffs at the time the charts were produced. The majority of the grower data included in the “Cargill Grower Summary” cited by Plaintiffs either came from Plaintiffs or had already been produced in forms kept by the companies; the only information that had not been produced was the work product information collected by counsel. For example, the Cargill Defendants produced in earlier discovery responses versions of a similar summary table that listed available grower data regarding house count, bird type, bird count, and estimating the amount of litter produced per year.⁴

Indeed, as Plaintiffs’ attorney acknowledged at the August 18, 2009 hearing on the parties’ summary judgment motions, Plaintiffs already had and used essentially this same information about Cargill growers at the preliminary injunction hearing in February and March

⁴ (See Dkt. 2461-9, filed under seal.) Plaintiffs used versions of these documents in their depositions of Cargill employee Tim Alsup and others. (E.g., Alsup Dep. at 149:25 – 154:7, 158:5 – 159:25; Dkt. 2079-3.) The Cargill Defendants also provided estimates of the total number of their birds in the IRW. (CTP Resp. Interrog. 1: Dkt. 2461-10.)

of 2008. Plaintiffs' attorney Louis Bullock stated:

This is the map, and you might recall this from the preliminary injunction hearing, where we have the poultry houses of each of the defendants in this case located. So we know where they are, we know where they are distributed. We can look upgradient up these streams and see where the poultry houses are and the way that the rivers, creeks and streams up in the higher parts of the watershed up in Arkansas the way all of those are interconnected into the main bodies of water which we are concerned, Barren Fork, Flint Creek, and the Illinois River and eventually into Lake Tenkiller.

(Aug. 18, 2009 Tr. at 157:15-25, emphasis added: Dkt. 2548.) Mr. Bullock later made the point again more specifically as to the Cargill Defendants with respect to the concentration of litter application in the spring months:

And the timing of disposal further suggest the manner in which this whole process works. As the ads show, defendants promote, they promote their waste as a good and excellent fertilizer. The result is what you expect. And if you look at the chart that's up there now, this is from the Cargill data, but if you recall the preliminary junction we presented similar data showing that in preparation for or actually almost in concert with our spring rainy season in April and May, you know, April showers bring May flowers.

(Id. at 174:14-22, emphasis added.) Thus, despite Plaintiffs' emphasis on spring application as an area of supposed prejudice in their current motion for sanctions (see Dkt. 2459 at 10, n.7), Plaintiffs have long had this information,⁵ and suffered no prejudice from not having the work product charts earlier.

4. The documents were filed with the Court by Plaintiffs in support of their positions on dispositive motions.

Plaintiffs also suffered no prejudice based on any inability to use the newly produced documents in connection with summary judgment motions. Plaintiffs filed a Motion for Leave

⁵ In fact, this issue has never been contested. Defendants themselves noted the prevalence of spring application in their motion seeking leave for their own experts to test in the spring of 2009. (E.g., Dkts. 1297 at 21, 1344 at 8-9.)

of Court to Supplement Summary Judgment Record on August 11, 2009 (Dkt. 2452), seeking to supplement the summary judgment record with the Applications Chart, the Cargill Grower Summary, and “related emails.” (*Id.* at 1.) The Cargill Defendants did not oppose the requested relief. The Court granted the supplementation motion, and Plaintiffs’ counsel argued the summary judgment motions based in part on the new documents. (Aug. 18, 2009 Hrg. Tr. at 168:17 – 170:5; Dkt. 2548.) The Court subsequently denied both Plaintiffs’ and the Cargill Defendants’ dispositive motions. (Min. Order for Aug. 19, 2008 Hrg.: Dkt. 2472.) Plaintiffs thus suffered no prejudice in their motion practice as a result of the timing of the production of the attorney work product documents.

5. The Cargill Defendants, their corporate representatives, and counsel did not provide untruthful discovery responses and testimony.

Plaintiffs ask that the attorney work product developed by the Cargill Defendants’ non-testifying experts and by counsel be deemed general corporate knowledge attributed to the Cargill Defendants themselves, and then seek sanctions based on that retrospective fiat. In essence, Plaintiffs ask the Court to abolish the attorney work product privilege.

For example, Plaintiffs assert that Cargill 30(b)(6) witness Tim Maupin’s testimony that Cargill “do[es not] track the poultry litter on our contract producers’ farms” was false because Mr. Maupin did not disclose the work product that his attorneys had gathered and generated on the subject. (*See* Dkt. 2549 at 4-5 (citing 7/21/08 Cargill 30(b)(6) Dep. at 84).) The work product was not provided by counsel to Mr. Maupin in the first instance, so he could not have known of it when he was deposed. (*See* Ehrich Aff. ¶ 7; Dkt. 2461-2).

Again, both the Cargill Defendants and the Plaintiffs have consistently taken the view throughout this litigation that a party witness has no duty to discover and disclose to adverse parties attorney work product, including work product from consulting experts. Indeed,

Plaintiffs' attorneys prevented state deponents from revealing attorney work product or disclosing information gathered by or for their then-undisclosed experts. For example, at the deposition of John Littlefield, an Oklahoma state poultry inspector, Plaintiffs' counsel objected to and prevented Mr. Littlefield from testifying concerning attorney instructions about soil sampling Mr. Littlefield was asked to do, even though Mr. Littlefield plainly had that knowledge:

Q Okay. And the purpose of the sampling that was being addressed at that meeting was for the Attorney General's expert consultants in this case to obtain and analyze certain materials from farms of the Deselected growers; isn't that true?

A I – I don't – I can't say that for sure, I don't know. All I was told was I was given a list of growers to do some special testing.

Q Okay.

A And I don't know, you know, I can't read anybody else's mind about it.

Q Was it a lawyer that gave you those parameters to be tested, David Page?

A I believe it came from a lawyer. I'm not sure. It might have come from Dan, but I don't think it did. I think it came from attorneys.

Q Does it --

MR. NANCE: Here's the point where I'll object to anything told him by attorneys on the case as attorney-client privilege and work product.

MR. ELROD: Okay.

Q (By Mr. Elrod) Have you attended any meetings to find out about the meetings, have you attended any meetings with Mr. Page, Mr. Nance or any other lawyer working on this case? That's the question.

MR. NANCE: That's a yes or no question. Have you attended meetings with lawyers?

A Meeting.

MR. NANCE: You might add Mr. Hammonds and Ms. Stewart to that list.

Q (By Mr. Elrod) Sure.

A Well, yeah, I – I met with some.

Q Okay. Now, I'm not going to ask you about any – did you meet with them to prepare for this deposition?

A Yes.

Q Okay. I don't want to know anything about that, okay? I don't think I want to know anything about that. Somebody else might, I don't. But the question on the table is, were there other meetings, besides getting prepared for this deposition, at which lawyers for the State of Oklahoma were present?

A Early on there was.

Q Okay. Early on being?

- A When they first gave us a list of growers to go out and do some soil testing on.
- Q Okay. And that would have been sometime shortly before May 3, 2005, shortly –
- A I don't know the date.
- Q – I mean within weeks; is that true?
- A Yes, it would be before this meeting date that we had.
- Q All right. There was a planning meeting, is that fair, to obtain these soil samples?
- A I'm thinking it was.
- Q All right.
- MR. ELROD: Now, are you claiming privilege on that, Bob?
- MR. NANCE: Yes.

(John Littlefield Dep. at 56:20 – 59:4 (8/2/2007): Dkt. 2079-12.)

Where Plaintiffs can legitimately invoke work product protection to prevent their witnesses from testifying about their knowledge of information gathering for Plaintiffs' as-yet undesignated experts, it follows *a fortiori* that a Cargill witness has no duty to learn of or testify about attorney work product that the Cargill Defendants have given to their consulting expert. Mr. Maupin's testimony was truthful and accurate, and offers no justification for the sanctions Plaintiffs seek.

6. The documents are not relevant to the depositions by Plaintiff of defense experts Drs. Andy Davis and Brian Murphy.

Plaintiffs complain that the work product documents should have been considered in the depositions of testifying defense experts Drs. Davis and Murphy. (Dkt. 2459 at 10-11.) The complaint is unfounded. Drs. Davis and Murphy developed their opinions without access to confidential attorney work product. These experts did not have access to the work product documents, any more so than did Plaintiffs' experts, whose opinions Davis and Murphy critique. Neither of these Cargill experts used the grower-specific data from the work product documents, nor do Plaintiffs suggest that they did. On the contrary, Drs. Murphy and Davis used the environmental data *collected by the State* to assess whether that data would permit Plaintiffs to tie any specific effects from litter application to a specific Cargill location. (Davis Dep. at

104:24 – 108:2; 110:22 – 111:8: Dkt. 2207-2.) And despite the site-specific information Plaintiffs had available, the data Plaintiffs gathered permits no such inference; Plaintiffs’ theory of causation is IRW-wide and nonspecific. Plaintiffs cannot credibly claim prejudice from being denied the opportunity to ask questions of experts that have nothing to do either with the basis of Plaintiffs’ case or with those experts’ actual opinions.

D. The Sanctions Plaintiffs Propose Are Disproportionate and Logically Unrelated to the Claimed Prejudice.

Even assuming for the sake of argument that the Cargill Defendants had engaged in some sort of conduct that was in some way sanctionable, the sanctions that Plaintiffs propose in their motion are inappropriate and wildly disproportionate to even the conduct Plaintiffs claim.

Proposed sanctions 1-3 ask the Court to intercede to repair both Plaintiffs’ deficient causation evidence and ultimately their entire litigation strategy. The proposed sanctions effectively award Plaintiffs a partial judgment as a matter of law against Cargill on the fact-intensive issue of grower-specific causation. Plaintiffs do not suggest that the grower-specific allegations that they would have the Court declare to be “established facts” are actually true, do not suggest that they have any evidence to support these “facts,” and do not suggest how the lack of the Cargill attorney work product documents prevented Plaintiffs from developing the evidence they need to meet their burden on this issue.

Moreover, as noted above, Plaintiffs’ entire strategy of the case from the beginning has been that they did not need to prove grower-specific causation, and in fact neither their discovery efforts nor their experts’ analyses have pursued any proof of any grower-specific instances of conduct. Now that Defendants have pointed out the potentially fatal consequences to Plaintiffs’ claims of such an omission, Plaintiffs ask the Court to deem that they have met their burden of proof on causation in a manner that contradicts their declared theory of the case. Nothing in the

conduct of the Cargill Defendants justifies such a draconian sanction.⁶

CONCLUSION

The Cargill Defendants ask the Court to deny Plaintiffs' motion for sanctions.

Dated September 10, 2009.

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

By: /s/ John H. Tucker

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
100 W. Fifth St., Ste. 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Tel: (918) 582-1173
Fax: (918) 592-3390

FAEGRE & BENSON LLP
Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Tel: (612) 766-7000
Fax: (612) 766-1600

**Attorneys for Defendants Cargill, Inc. and
Cargill Turkey Production, LLC**

⁶ As to Plaintiffs' other proposed sanctions, proposed sanction 4 is moot given the Court's denial of the Cargill causation-based dispositive motions, and proposed sanction 5 is unwarranted as there has been no misconduct.

CERTIFICATE OF SERVICE

I certify that on the 10th day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us

Melvin David Riggs
Joseph P. Lennart
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
David P. Page
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

driggs@riggsabney.com
jlennart@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
Bullock, Bullock and Blakemore, PLLC

lbullock@bullock-blakemore.com

William H. Narwold
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Fidelma L Fitzpatrick
Mathew P. Jasinski
Motley Rice LLC

bnarwold@motleyrice.com
fbaker@motleyrice.com
lheath@motleyrice.com
cxidis@motleyrice.com
ffitzpatrick@motleyrice.com
mjasinski@motleyrice.com

COUNSEL FOR PLAINTIFFS

A. Diane Hammons
Attorney General, Cherokee Nation
Sara E. Hill

diane-hammons@cherokee.org
sara-hill@cherokee.org

COUNSEL FOR INTERVENER, CHEROKEE NATION

Stephen L. Jantzen
Paula M. Buchwald
Patrick Michael Ryan
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Gordon D. Todd
Erik J. Ives
Cara R. Viglucci Lopez
Sidley Austin LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
gtodd@sidley.com
eives@sidley.com
cvigluccilopez@sidley.com

L Bryan Burns
Robert W. George
Michael R. Bond

bryan.burns@tyson.com
robert.george@tyson.com
michael.bond@kutakrock.com

Erin W. Thompson
Dustin R. Darst
Kutack Rock LLP

erin.thompson@kutackrock.com
dustin.dartst@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.,
AND COBB-VANTRESS, INC.**

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
William D. Perrine
Lawrence W. Zeringue
David C. Senger
Gregory A. Mueggenborg
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
wperrine@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net
gmueggenborg@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
Vincent O. Chadick
K. C. Dupps Tucker
Bassett Law Firm

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
vchadick@bassettlawfirm.com
kctucker@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
P. Joshua Wisley
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
jwisley@cwlaw.com

A. Scott McDaniel
Nicole M. Longwell
Philip D. Hixon
Craig Mirkes
McDaniel, Hixon, Longwell & Acord, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mws gw.com

Michael D. Graves
Dale Kenyon Williams, Jr.
COUNSEL FOR CERTAIN POULTRY GROWERS

mgraves@hallestill.com
kwilliams@hallestill.com

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC.,
TYSON POULTRY, INC., TYSON
CHICKEN, INC.; AND COBB-
VANTRESS, INC.

s/ John H. Tucker